SUPREME COURT, U.S.
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No. 01-1212

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILWAY CO.,
Petitioner,

v.

TAMERA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Court of Appeals

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner Grand Trunk Western Railway Company's ("Grand Trunk") petition for certiorari presents a clear conflict between the Indiana Court of Appeals' decision and this Court's decisions in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). The petition also poses a substantial and mature conflict among the circuits on an important question of federal law: namely, the timing of pre-emption in a mid-project crossing accident. This conflict undermines the explicit goal of the Federal Rail Safety Act of 1970 ("FRSA"), 49 U.S.C. § 20106, to promote "[n]ational uniformity" in rail safety rules and warrants resolution by this Court.

Respondent fails to refute either of these conclusions. First, respondent tries to distinguish this case from *Shanklin* by arguing that pre-emption did not occur here. To evade the application of pre-emption, respondent creates a new definition of federal-aid "participation." Respondent's argument founders, however, on the language and structure of the regulations, which establish that pre-emption had occurred here, as in *Shanklin*, prior to the accident.

Second, respondent illogically denies the existence of a circuit split by suggesting that the conflict might go away if the Court of Appeals for the Tenth Circuit were to overrule its precedent in light of *Shanklin*. Respondent's Brief in Opposition 8 ("Opp."). But that is wishful thinking. *Shanklin* did not address the issue of mid-project collisions and provides no basis for overruling prior precedent; the Tenth Circuit decisions in question postdate *Easterwood*, and *Shanklin* did not depart from *Easterwood*; and as demonstrated below, the Tenth Circuit's rule is the only one consistent with the plain language of the statute and regulations. The existence of a conflict among the circuits is

indisputable, and its resolution is necessary to implement the congressionally-mandated goal of uniformity in rail safety rules.

1. Respondent strains to avoid the conflict between the Indiana court's decision and this Court's holdings in *Easterwood* and *Shanklin*. In *Easterwood*, this Court held that "for projects in which federal funds participate in the installation of warning devices," pre-emption occurs. *Easterwood*, 507 U.S. at 671. *Shanklin* reaffirmed this rule and held that pre-emption in that case occurred when federal funds had participated in the installation of passive warning devices. *Shanklin*, 529 U.S. at 353-54. In the instant case, federally funded warning devices—stop signs, warning signs, and pavement markings—were installed, but the state court denied pre-emption. As argued in the petition, the decision below so clearly departs from the black-letter rule of law announced in *Easterwood* and *Shanklin* that it warrants summary reversal.

Respondent first mischaracterizes petitioner's argument as suggesting that there were two distinct projects at the crossing. Petitioner makes no such claim. Rather, petitioner relies on the fact that at the time of the accident the only devices at the crossing were federally funded, and therefore—under any view of *Easterwood* and *Shanklin*—the federal regulation on adequacy of devices (23 C.F.R. § 646.214) applied and pre-empted state law. As *Shanklin* holds, it is simply immaterial to pre-emption whether additional devices were necessary under federal law. 529 U.S. at 357-58; Petition for Certiorari 14-16 ("Pet."); see also *Bock* v. *St. Louis Southwestern Ry.*, 181 F.3d 920 (8th Cir. 1999) (finding pre-emption because of federally funded crossbucks, even though there had been no installation of subsequently required active devices), *cert. denied*, 529 U.S. 1086 (2000).

Respondent next attempts to distinguish this Court's precedents by redefining the moment when funds "participate" in the installation of devices. According to respondent,

the moment is when the final federal funds are "disbursed." Opp. 3. Respondent reasons that, since federal funds were disbursed after the passive devices in this case were installed, federal funds did not participate in their installation prior to the accident, and pre-emption would not apply.

Respondent's position is contrary to the entire statutory and regulatory scheme of federal highway funding. "Participation" is not synonymous with disbursement. Federal funds participate whenever reimbursable work is performed pursuant to an authorized federal-aid highway project (*i.e.*, one to which federal funds are obligated by an executed project agreement between the Federal Highway Administration ("FHWA") and the State).[1] The statute is explicit on this point: "[t]he execution of the project agreement [by the Secretary of Transportation] shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project." 23 U.S.C. § 106(a)(3).[2] As the FHWA has explained:

> An obligation is a commitment—the Federal government's promise to pay the States for the Federal share of a project's eligible cost. This commitment occurs when the project is approved and the project agreement is executed. Obligation is a key step in financing. *Obligated funds are considered "used" even though no cash is transferred.*

Federal Highway Admin., U.S. Dep't of Transp., *Financing Federal-Aid Highways* 16 (1999) (emphasis added, footnote

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[1] *See* Brief of the Association of American Railroads as *Amicus Curiae* in Support of the Petition 10-12 (describing the process for FHWA project authorization and agreement execution in rail-highway crossing improvement projects).

[2] The prior version of 23 U.S.C. § 106 included almost the same words: "[The Secretary's] approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a) (1997).

omitted). Courts have also recognized that federal funds are obligated as soon as the agreement is signed. See *Maine* v. *Goldschmidt*, 494 F. Supp. 93, 95 (D. Me. 1980); *Tennessee ex rel. Leech* v. *Dole*, 567 F. Supp. 704, 711 (M.D. Tenn. 1983) ("Obligation is the key step because obligated funds are considered 'expended' even though no cash is transferred."), *rev'd on other grounds*, 749 F.2d 331 (6th Cir. 1984).

The federal regulations on "participation" of federal funds in 23 C.F.R. parts 140 and 646 define the kinds of work compensable by the federal funds that are obligated after the project is authorized and the agreement executed. Under the regulations, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); see also *id.* § 140.904(b). When any of that eligible work is in fact performed, federal funds participate in that work and in the costs incurred. See, *e.g.*, *id.* § 646.216(c)(3) (imposing limitations on railroad charges "[w]here Federal funds participate in the cost of replacement right-of-way"); *id.* § 646.216(b)(2) (describing conditions under which "Federal-aid funds may participate in the amounts paid to engineering consultants"); *id.* § 140.907(b) (rules for federal participation in overhead and indirect construction costs); *id.* § 140.801 ("reimbursement criteria for Federal participation in project related audit expenses").

Respondent's unsupported claim that federal funds "participate" in project work only when the project is fully completed and federal funds disbursed is inconsistent not only with the regulations but with the governing statute. 23 U.S.C. § 109(d) provides that:

> [o]n any highway project in which Federal funds hereafter participate, ... the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed

> or placed by any public authority or other agency, shall be subject to the approval of the State transportation department with the concurrence of the Secretary.

Obviously, the state agency and the Secretary do not exercise their approval authority only when the project is complete and funds already disbursed. Similarly, section 109(n) makes clear that federal-aid participation occurs during the course of the project, not after final payment is made; it provides that "any project for resurfacing, restoring, or rehabilitating any highway, other than a highway access to which is fully controlled, in which Federal funds participate shall be constructed in accordance with standards to preserve and extend the service life of highways and enhance highway safety." *Id.* § 109(n). Federal funds participate in any reimbursement-eligible work that is undertaken in an authorized federal-aid project.[3]

Thus, there can be no question of the meaning of the pre-emptive regulation in this case. That regulation establishes criteria for "[a]dequate warning devices" "on any project where Federal-aid funds participate in the installation of the devices," *i.e.*, where installation is performed on a project authorized by the FHWA for which a project agreement is executed. 23 C.F.R. § 646.214(b)(3)(i) (emphasis omitted). Federal funds participate in all phases of installation work: "preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation

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[3] The federal-aid highway program "is a reimbursable program," meaning that once federal funds are authorized for a project "the State can incur obligations, begin projects, and then later be reimbursed for the costs incurred." Federal Highway Admin., U.S. Dep't of Transp., *Financing Federal-Aid Highways* at 17. Respondent's argument would tie the regulations in an impossible knot by requiring that reimbursement be delivered before "participation" could occur, while the regulations provide that reimbursement is for costs in which federal funds participate. *See* 23 C.F.R. § 140.904(b).

improvement program and authorized by the FHWA are eligible for Federal-aid participation." *Id.* § 646.216(e)(1). Thus, the federal warning-device regulations are applicable from the beginning of an installation project, and "when they are applicable, state tort law is pre-empted." *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 352. Federal funds participated in the installation of devices at the Hendricks Street crossing prior to the accident,[4] and hence any prior state-law duties that the railroad had to provide adequate warning devices were pre-empted.

Federal funds do not "participate in the installation of the devices" if no installation occurs, and in that event the federal warning-device regulation would not come into play and pre-emption would not occur. That is the lesson of *Easterwood*, in which an authorized grade crossing improvement project was "shelved," and the federally mandated warning devices were never installed at the crossing in question. The *Easterwood* Court found that pre-emption had not occurred. 507 U.S. at 672. But unlike *Easterwood*, in the Hendricks Street project the public authority had already installed the passive devices and was engaged (via the railroad contractor) in the installation of the active devices, and federal funds participated in the installation throughout. *Easterwood* does not stand for the nonsensical proposition that the federal regulation on the selection of warning devices does not apply until after the devices are "installed and operating"; it simply holds that pre-emption does not occur when the project does not involve the installation of warning devices.[5]

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[4] As noted in the petition, Pet. 18, federal funds in this type of project reimburse 90 percent of the State's total eligible costs for the project, and are not directly earmarked to the individual devices. 23 C.F.R. § 646.212(b)(3).

[5] The Indiana court's adoption of an "installed and operating" test is not only nonsensical, but it also collapses the distinction between the two kinds of federal-aid projects to which the federal warning-device regulation (23 C.F.R. § 646.214(b)(3) and (4)) applies. That regulation

Respondent's attempt to redefine participation thus cannot stand in light of the plain language and structure of the statute and regulations. Participation is not coterminous with reimbursement; funds participate in an installation prior to the actual disbursement of federal funds to the State. Installation occurred in this case pursuant to the federal-aid project, and federal funding participated in this installation. *Easterwood* and *Shanklin* hold that when this happens, pre-emption occurs. The conflict between the Indiana court's decision and this Court's decisions is patent.

Contrary to respondent's claims, this commonsense interpretation of pre-emption does not mean that the public is unprotected for the duration of the project, because the FHWA assumes authority over interim safety measures in a federally funded grade crossing improvement project. Pet. 21-22. Respondent objects to the petition's citation of a regulation providing that the "pertinent portions of the State-railroad agreement applicable to any protective services required during performance of the work must be included in the project specifications and special provisions for any construction contract." 23 C.F.R. § 646.216(e)(2)(iv), *quoted*

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applies "under 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices." *Id.* § 646.214(b)(3)(i). Subsection (b)(2) covers all federal highway projects that do not themselves involve the installation of devices, and provides that:

> where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for the construction of a new highway or the improvement of an existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

Id. § 646.214(b)(2). Under (b)(2), then, the FHWA evaluates existing devices for adequacy, and the adequacy rules of (b)(3) and (4) are sensibly applied to devices that are installed and operating. By contrast, for device-installation projects, the adequacy rules of (b)(3) and (4) are applied *prospectively* to govern the determination of which devices will be installed. Given this scheme, it makes no sense to hold that the regulation is not applicable (and thus not pre-emptive) until the devices are installed.

in Pet. 21-22. Respondent asserts that "services" are "labor" and therefore cannot be "interim protection." Opp. 7. This definition of "services" is unsupported by the regulations and contrary to its plain meaning. The regulation refers to "protective services" without qualification, whether they are supplied by human, mechanical, or other means. To be sure, protective services can be provided by labor, see *Thiele* v. *Norfolk & W. Ry.*, 68 F.3d 179, 184 (7th Cir. 1995) (noting the possible use of flagmen), but the regulation is not so limited. The FHWA has defined protective services costs to include broadly any "[e]xpenses incurred in the provision of safety to railroad and highway operations during the construction process." Federal Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 188 (1986); *accord* 23 C.F.R. § 140.916. Not only is this definition broader than "labor," but also it is distinct from the definition of "Labor costs" in the same subpart. *Id.* § 140.906. Moreover, it would be bizarre to construe the FHWA's regulation to require disclosure of only labor services rather than the full range of protective services that are be employed to ensure rail and highway safety during the installation project. This regulation is itself pre-emptive of any state-law duties regarding warning devices during installation; once the FHWA has approved the protective services provisions of the agreement, the railroad is not at liberty to dictate the choice of different interim protective services, and therefore state law is pre-empted.[6] A railroad cannot be held liable for the federal government's decision.

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[6] Respondent also repeats the fact noted in the petition that the Code of Federal Regulations' incorporation of the U.S. Department of Transportation's *Manual on Uniform Traffic Control Devices for Streets and Highways* ("MUTCD") does not have pre-emptive effect. Pet. 15 n.10; Opp. 7. The Petition refers to the MUTCD not as a source of pre-emption but as a classification of stop signs as interim safety devices that must be authorized before installation. Pet. 22.

2. Respondent incredibly denies the existing circuit split on the basis of respondent's assertion that the Tenth Circuit should change its position and overrule its precedent. Opp. 8. Of course any circuit split might be eliminated if certain courts were to overrule their precedents, but idle speculation on such an occurrence is immaterial. The Tenth Circuit's decisions are in undeniable conflict with this case and with other federal circuits on the timing of pre-emption. The Tenth Circuit held in *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996), and *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995) (mid-project crossing accident), that pre-emption is triggered at the beginning of a federal-aid railroad project, when the decisionmaking authority of the railroad ends. The Indiana court in this case joined several federal courts of appeals in determining the opposite, that pre-emption occurs at the end of the project. See *Thiele*, 68 F.3d at 184; *St. Louis Southwestern Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994); see also *Akin* v. *Missouri Pac. R.R.*, 977 P.2d 1040, 1052-53 (Okla. 1998). The Tenth Circuit decisions are still the law of that circuit, and in no way were they overruled by *Shanklin*, which did not decide the issue of pre-emption in mid-project collisions. Moreover, as previously noted, the Tenth Circuit decisions alone are consistent with *Easterwood* and the plain meaning of the statute and regulations addressing federal-aid participation in highway projects.

In contravention of the FRSA policy of nationally uniform safety laws, this split imposes different requirements on railroads depending on the location of the tracks. Furthermore, all railroads that operate in Indiana are unsure of their duties and unable to rely on the prioritization and selection rules of the Section 130 program. See 23 U.S.C. § 130. Nor are railroads able to rely on the clear rule of *Easterwood* and *Shanklin* that pre-emption applies when federal funds participate in the installation of devices. The obvious variations in duties applicable to railroads in different

jurisdictions illustrate vividly the impact of this circuit split. Even within a single jurisdiction, federal law is indeterminate; under *Akin* the supreme court in Oklahoma (an important railroad state with three Class I railroads and twelve other railroads) applies a different pre-emption rule from the Tenth Circuit's *Armijo/Hatfield* standard, an untenable situation which can only foster forum shopping. It is critical for this Court to resolve this conflict.

In summary, the Indiana court impermissibly disregarded the fact that the warning devices at the Hendricks Street crossing at the time of the accident were installed with federal funds and governed by 23 C.F.R. § 646.214(b)(3) and (4). Under any reading of *Easterwood* and *Shanklin*, state tort law duties imposed upon the railroad regarding the selection of devices are pre-empted, and the decision below should be summarily reversed. Even if this Court were not to grant summary reversal on the basis of the federal funding of the installed passive devices, it should resolve the mature division among the courts on a question of national importance, that of pre-emption timing. This Court's review is all the more imperative when the rule adopted by the Indiana court undermines the national uniformity that Congress ordered in the FRSA; conflicts with the plain meaning of the regulations; and arises from an unwarranted interpretation of *Shanklin* that only this Court can correct.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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